ONTARIO VS. FRANCIS.

The Case Involving the Delination of Certain Indian Reserves and the Right to Cut Timber Decided in Favor of the Dominion

The important case of the Attorney-General of Ontario vs. Francis, in which the issue concerning certain timber limits on White Fish lake, affecting both the Dominion and Provincial Governments, was decided on the 19th ult. by Mr. Justice Ferguson in favor of the Dominion. The question was one of unusual interest, involving, in addition to the dispute as to the boundaries of the reserve, the question as to whether the Ontario or Dominion Government had the right to issue licenses, enter upon ' cut timber. The judgment, which as above stated was decided in favor of the Dominion Government, is given below. Though rather exhaustive it will no doubt be read with a great deal of interest.

THE JUDGMENT.

The action is brought by the Attorney-General of the Province of Ontario, on behalf of her Majesty the Queen, against James Harvey Francis, Allan Francis and Theophile Rochon for, amongst other things, an injunction restraining these defendants from trespassing by cutting timber on certain lands situated in, and, as is alleged, the property of the Province of Ontario, lying near Whitefish Lake, in the district of Algoma, the lands referred to being described as lands known as certain timber limits of Ontario, Nos. 69, 70, 75, 76, 77, 83 and 84, it being alleged that these defendants had entered upon these lands without permission from the Crown or from the Province of Ontario, and cut pine timber therefrom upon limits Nos. 69, 70 and 76 amounting to about 10,000 logs and 1,000 pieces of timber. The Attorney-General, for the Dominion of Canada, was made a party defendant. The first-named defendants claimed to have the right to cut the timber in question, under the authority of certain licenses so to do, granted by the proper department or officers of the Government of the Dominion of Canada to certain persons from or through whom these defendants claimed by purchase for valuable consideration. The defendants John Dorid Smith, James Gueot, Williams and George Henry Graham McVitty are executors and trustees under the will of the late Robert Charles Smith, who was, as they allege, at the time of his death the owner of limit or berth No. 69, one of those above mentioned, by virtue of a sale thereof by the executive Government of the Province of Ontario.

The defendants James Balfour and William John Menzies claimed to be entitled to limit or berth No. 70, also one of those above mentioned, by virtue of a license granted to them by the Province of Ontario.

The defendants the Quebec Bank claim to be entitled to or have some right in respect of limit or berth No. 76 by virtue of a sale thereof to one McRae by the Government of the Province of Ontario, saying that this limit is now standing in the name of one Walker upon certain trusts.

The defendants Thomas Laing and John Laing have been added by an amendment as having some interest in limit or berth No. 84, one of these above mentioned. These do not seem to have filed any statement or defence, but they were duly represented by counsel, who appeared for all the defendants interested under licenses issued by the Government of the Province of Ontario. One does not readily perceive any sufficient reason for making persons claiming under licenses from the Government of Ontario parties defendant in the action, for it could scarcely have been expected that in matters of so great importance as one involved in the action substantial and material relief could probably be granted in favor of some defendants against other defendants without any pleadings between them or any specific issues being raised by one or any of them against the other or others of them, and so far as any of the defendants might appear to be entitled to any relief against the plaintiff, this could not be obtained in this action, or as was contended, and I think rightly, in any way except by a petition of right.

Besides the relief that I have already mentioned, the plaintiff asks that it may be declared that the defendants, the Francis's and Rochon, have no legal rights in respect of the timber cut from and on any part or portion of the area covered by the above mentioned timber limits, and that the timber that has been cut should be delivered up to the plaintiff, also an injunction against the removal of the same as well as an order or the payment of the damages alleged to have been sustained.

The plaintiff asks, in addition to the foregoing, that the defendant by the Attorney-General of the Dominion of Canada may be restrained from laying out or interfering with the lands as the reserve for the Indians on the timber limits before mentioned, or any part thereof, and that the true locality of the Indian reserve described by the treaty, mentioned in the second paragraph of the statement of claim, be declared, and such directions given as may be thought proper. The treaty was made with the Indians inhabiting the eastern and northern shores of Lake Huron, from Penetanguishene to Sault Ste. Marie, and thence to Botchewaning Bay, on the northern shore of Lake Superior, together with the islands in these lakes opposite to the shores thereof, and inland to the height of land which formed the southern boundary of the territory covered by the charter of the Hudson's Bay Company, whereby the whole of such territory, save and except the reservations set forth in the schedule to the treaty annexed, was surrendered and ceded to her Majesty, her heirs and successors forever. This treaty was made in the year 1850, and is known as the "Robinson-Huron Treaty," the representative of her Majesty in the treaty having been the late Honorable William B. Robinson.

The treaty was signed and executed by Mr. Robinson and a large number of chief and head men of the Indians, and in the schedule are mentioned seventeen reserves or reservations to chiefs and their respective bands of Indians. It provides that these reservations should be held and occupied by the chiefs and their tribes, in common for their own use and benefit, and that should the chiefs and their tribes at any time desire to dispose of any such reservations or of any mineral or other valuable productions thereon, the same should be sold or leased at their request by the Superintendant-General of Indian Affairs for the time being, or other officer having authority so to do, for their sole benefit and to their best advantage. The reserve mentioned in the plaintiff's statement of claim and in respect of which the present difficulty and intention seems principally to have arisen, is the one No. 6 in this schedule and is thus mentioned therein.

"Sixth Shawenakishick and his band, a tract of land now occupied by them and contained between two rivers called Whitefish and Wanabitaseke, seven miles inland," other than this change there does not seem to have been at the time any other or further description of this reserve, and the others of the seventeen reserves are mentioned or described in the schedule to the treaty in a manner somewhat similar, if not in the same manner, or at all events with great brevity. The evidence shows that it was intended and that it was promised to the Indians that the reserve should soon after the treaty be surveyed by the Crown and their true boundaries marked out, and I think it sufficiently appears that it was understood that when the Crown surveyors were sent for the purpose of making the surveys, the Indians were to point out and show to them the lands that they claimed and had claimed as such reservations. Many years ago these reserves were surveyed by the Crown, as was contemplated, excepting this one, No. 6 in the schedule and, as was stated at the trial, another one. The reason why all the surveys were not completed at the same time does not appear in the evidence, but it was said that the survey stopped before completion for a reason personal to the Crown Surveyor who was engaged in the work.

In the year 1872 the Executive Government for the Province of Ontario, for the purposes of timber sales in the region or tract ceded by the above mentioned treaty, projected on a plan into an area of six square miles each, berths which were numbered and sold according to the regulations prescribed by the Government of the province on the 15th day of October in that year, and among others then sold were the several berths aforesaid and in pursuance of such sales licenses to cut timber on the timber berths were in consideration of certain payments, and to continue in force for one year, issued to the purchasers by the Crown Land Department of the province, and it is not disputed that these licenses have been renewed every year since, either by the purchasers or those to whom the licenses have been assigned, according to the provisions of the statues in that behalf.

Early in the year 1884 the Dominion Government caused a survey of this Reserve No. 6 to be made by Mr. Aubrey, a provincial land surveyor.

In July, 1885, the same Government obtained from the Indians through their chief and head men or principal men, a deed whereby they surrendered, released and quitted claim to her Majesty the Queen, her heirs and successors forever, all and singular the whole of the merchantable timber on the reserve in trust, to be sold for the joint benefit of the band on such terms and conditions as to her Majesty's Government of Canada should seem proper, and as therein mentioned and on the 14th of October, 1886, the timber licenses were issued by the Dominion Government. These have been regularly renewed, according to law, and the licenses under the authority of which the defendants Francis' and Rochon were professing to act in cutting the timber on this Reserve. They had been assigned in the meantime by the original licensees but I need not, I think, say anything further as to this. The plaintiff, in the statement of claim complains that although the sales made by the Ontario Government in 1872 had been widely advertised, and plans of the territory and berths thereon distributed showing that the berths covered the territory now claimed by the Government of Canada as Reserve No. 6, yet that no notice was given by the Superintendent-General of Indian Affairs, or by anyone on behalf of the Government of Canada to the Crown Land Department of Ontario, of any reservations being required within that area or the Indians, or of any Indian reservation or of any right to lay out such reservation, and that no action was taken by the Indian Department or the Government of Canada for twelve years or thereabouts after the sales made by the Province of Ontario. The argument based upon this complaint do not go the length of asserting that any right additional to the rights such as they were was gained by what had been done by the Ontario Government and what was said to have been left undone by the Indian Department of the Dominion Government, and it was somewhat difficult for me to see why the contention was raised at all. The evidence of Mr. Vankoughnet, a gentleman who has been 28 years in the Indian Department of the Government, and the correspondence between that department and the Department of Crown Lands at Toronto seem to put the matter in this shape. The Department at Ottawa were not aware that the Crown Land Department at Toronto had made the sales of these limits till long after the fact, that the knowledge of the fact was gained accidentally; that before any sale was made by the Dominion Government of this timber, or, rather, the licenses to cut it, the Indian Department had communicated with the Crown Land Department of the Government of Ontario, that, in consequence of not having received an answer to a certain letter on this subject, Mr. Vankoughnet, acting for the Indian Department, endeavored to see the Commissioner of Crown Lands at Toronto but failed in so doing at the time, but had instead an interview with the Deputy Commissioner on the subject, who said it was a mistake to sell the timber on the reserve. Mr. Vankoughnet, in his evidence, says that Mr. Johnston, the Deputy Minister of Crown Lands, said it was a mistake of some of the officers of the department in not having noticed the reserve on the plans; that he asked him what he proposed doing, and the answer was to the effect that the Provincial Government would have to settle with the purchasers of the licenses The witness further says:

"I think he said he would bring the matter before the commissioner." He also says he came from Ottawa to Toronto expressly for the purpose of this interview.

The letter of the 27th August, 1886, refers to this interview. It seems to me that what really appears is that, after this interview, Mr. Vankoughnet thought that the Ontario Government would simply settle for the consequences of the mistake, and that the department, of which he was the deputy superintendant, in this view proceeded to a sale of the timber, or the right to cut the timber, a surrender of which has been obtained by the Dominion Government from the Indians, and I repeat that I do not see why there was so much contention on this subject. I do not see that either Government was in a position to blame the other in the matter. I do not see that this or the contrary of it would make any difference in regard to the rights to be determined. As the locality of the reserve had to be determined, and as it had to be found as a fact whether or not the cutting of timber complained of had taken place upon the reserve, it was thought for various reasons that it would be convenient to take the evidence of the Indian witnesses at or near the place in question, and this evidence was so taken.

During the time of the taking of the evidence I was led to think that the only question to be determined between the contending parties was as to whether or not the timber, the cutting of which was complained of, had been cut upon land outside of the boundaries of the reserve, it being, as I thought, conceded that if it had been cut upon the reserve the cutting was done under proper authority so to do, but if done upon land not part of the reserve, it was wrongly done without any authority, these statements were certainly more than once made by counsel. Upon the final argument, however, counsel dissented from this as being the sole matter and contended that whether the cutting was done upon the reserve or not the property in the land and timber being (as was contended) vested in the Ontario Government, the cutting complained of was wrongful and could not be justified under any licenses issued under the authority of the Dominion Government. The plaintiff asks, as I have said that the true locality of this reserve should be declared. This is similar to asking for a declaration of right, and my duty in this respect is to fix the boundaries of the reserve as well as I can upon the evidence.

His Lordship then went exhaustively into the evidence given by the Indians as to the boundaries of their reserve, and decided as follows:

In my opinion it became entirely plain at the conclusion of the evidence upon the subject that the survey made by Mr. Abrey for the Dominion Government in the early part of '84 (I think) and the boundary lines laid down by him show the location of this reserve excepting that the true boundary on the northerly side or limit is the line of the waters called sometimes "White Fish River" and sometimes "White Fish branch." This line of water is also sufficiently designated by the names of objects on the ground that I have before mentioned. The part of Mr. Abrey's survey lying northerly of this line of waters does not, I think form any part of the reserve. The reason why this area of land was em-